SUPREME COURT, U. S.
MAY 14 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1105

HONORABLE ROBERT R. MERHIGE, JR., AND HONORABLE ALBERT V. BRYAN, JR.,

Petitioners,

v.

UNITED STATES BOARD OF PAROLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

ALVIN J. BRONSTEIN
PHILIP J. HIRSCHKOP
NANCY C. CRISMAN
National Prison Project of the
American Civil Liberties Union
Foundation
1346 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-0500

HERMAN SCHWARTZ
National Prison Project of the
American Civil Liberties Union
Foundation
525 O'Brian Hall, North Campus
Amherst, New York 14260
(716) 636-2091

MELVIN L. WULF
American Civil Liberties Union
Foundation
22 East 40th Street
New York, New York 10016
(212) 725-1222

Counsel for Petitioners

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1105

HONORABLE ROBERT R. MERHIGE, JR., AND
HONORABLE ALBERT V. BRYAN, JR.,
Petitioners,

v.

UNITED STATES BOARD OF PAROLE,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

REPLY BRIEF FOR PETITIONERS

The respondent, in its brief in opposition, argues that the court below was correct in holding that the case is moot as to the original plaintiff Novak and that there are no substantive issues posed by this case.

I.

THERE IS NO QUESTION OF MOOTNESS IN THIS CASE.

The respondent argues that the court below properly found that Novak's release on parole mooted the issues raised in his complaint (Res. Br. 8). The respondent goes on to say that the "Petitioners apparently do not seriously

contest the conclusion that the case is moot as to Novak personally." (Res. Br. 10, n. 6.). On the contrary, petitioners vigorously contest that holding and stated in their petition "That conclusion [mootness] is erroneous" (Pet. 8, n. 5.).

Indeed, two cases just decided by this Court reaffirm the correctness of petitioners position. *Super Tire Engineering Company v. McCorkle*, ___U.S.___, 42 U.S.L.W. 4507, No. 72-1554, April 16, 1974; *DeFunis v. Odegaard*, ___U.S.___, 42 U.S.L.W. 4578, No. 73-235, April 23, 1974. In *Super Tire Engineering Company* this Court, distinguishing declaratory from injunctive relief, said that ". . . since this case involves governmental action, we must ponder the broader consideration whether the short-term nature of that action makes the issue presented here 'capable of repetition yet evading review', so that petitioners are adversely affected by government 'without a chance of redress'. *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911)," and ". . . the challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuation and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." 42 U.S.L.W. at 4509.

The complaint in this case seeks declaratory as well as injunctive relief with respect to the alleged illegal governmental activity. In the court below, petitioners argued that Novak, who was then on parole status, could have his parole revoked by the respondent and once again be subjected to the challenged activity. We are surprised that the respondent, in its brief, did not advise this Court that after a hearing on February 14, 1974, the Board of Parole revoked Novak's parole and caused him to be returned to custody at the Federal Reformatory, Petersburg, Virginia,

on March 21, 1974.[1] He will be considered for parole again by the respondent in July, 1974.

Finally, the respondent could grant parole to the plaintiff-intervenors and other members of the prospective class action thereby continually evading review of their actions. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

II.

THE COURT OF APPEALS GRANTED MANDAMUS BECAUSE OF AN ERRONEOUS HOLDING ON SUBSTANTIVE ISSUES.

The respondent argues that there are no substantive issues in this case and that the sole issue is whether the court below correctly issued writs of mandamus in connection with discovery orders. (Res. Br. 9). That reading of the Court of Appeals' decision bears little or no relationship to reality.

The court below granted the writs of mandamus because it held that "the clear weight of authority" gives to the Board of Parole "absolute discretion in matters of parole" (Pet. App. 6a), and therefore "the complaint rests upon such a tenuous jurisdictional basis" (Pet. App. 8a). It is obvious that the court of appeals' decision addressed and decided the merits of substantive issues.[2]

---

[1] The reasons furnished for revocation were 1) failure to comply with special conditions of parole, and 2) failure to report an arrest. The revocation is presently being appealed by Novak to the National Appellate Board of the respondent. 28 C.F.R. 2.21 (38 Fed. Reg. 26654)

[2] It becomes absolutely clear upon a reading of the addendum to their opinion issued after this Court's action in *Scarpa v. United States Board of Parole*, 414 U.S. 809 (1973). (Pet. App. 10a, 11a.)

We have, in the petition for certiorari, illustrated why we believe the court below was incorrect when it held that the Board of Parole has absolute discretion. See *Burton v. Ciccone*, 484 F.2d 1322 (8th Cir. 1973) and other cases cited in the petition at pages 14-18. We respectfully bring to the Court's attention a number of other decisions, rendered since the filing of the petition, that support our claim that the court below erred on this issue. *Grasso v. Norton*, 371 F. Supp. 171 (D. Conn. 1974), Supplemental opinion, ___F. Supp.___, Civil No. B-813 (D. Conn. Apr. 30, 1974); *Lupo v. Norton*, 371 F. Supp. 156 (D. Conn. 1974); *Candarini v. Attorney General*, 369 F. Supp. 1132 (E.D. N.Y. 1974); *Starks v. Sigler*, ___F. Supp.___, C.A. 4-70230 (E.D. Mich. Jan. 17, 1974); *In re Sturm*, ___Cal. Rptr.___, Crim. 16799 (Sup. Ct. Calif., Apr. 18, 1974); cf., *King v. United States*, ___F.2d___, No. 73-1387 (7th Cir. Mar. 13, 1974).

CONCLUSION

For the reasons stated above, as well as those stated in the petition for certiorari, Petitioners pray that the petition for certiorari be granted.

Respectfully submitted,

ALVIN J. BRONSTEIN
PHILIP J. HIRSCHKOP
NANCY C. CRISMAN

National Prison Project of the
American Civil Liberties Union
Foundation
1346 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-0500

HERMAN SCHWARTZ

National Prison Project of the
American Civil Liberties Union
Foundation
525 O'Brian Hall, North Campus
Amherst, New York, 14260
(716) 636-2091

MELVIN L. WULF

American Civil Liberties Union
Foundation
22 East 40th Street
New York, New York 10010
(212) 725-1222

Counsel for Petitioners

May, 1974